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THE PRIVATE BAR — UNTAPPED RESERVOIR OF CONSUMER POWER

*Joseph D. Tydings**

As the decade of the 1970's begins, the political focus of Americans has increasingly centered on our domestic problems. New areas have emerged as cause for critical concern. In this "new" probe into our society's internal problems we have discovered that individuals are increasingly being overwhelmed by forces beyond their direct control. One of the most obvious areas of concern is the quality of the environment, where poisonous air, putrid water, and despoiled landscapes face the helpless citizen who views with alarm the destruction of our natural resources. Recently we have come to recognize that this situation is so damaging and threatening that our very existence is at stake. The legislative and executive branches have committed themselves, at least in speeches, to sweeping remedial action designed to restore the quality of our environment. Hopefully, action will follow words.

But there is a second area that deserves just as much concern and attention as the environment: the cause of the consumer. This is a broad field that encompasses many problems from advertising fraud, repair deficiencies, and oil import quotas to planned obsolescence, court reform, and unconscionable credit practices. The list is without limit. The stakes are tremendous; consumer fraud and shoddy goods alone may cause losses to the American public in excess of \$10 billion a year. And this figure does not include the indirect costs to consumers of artificial price support programs or goods designed for high repair costs.

Here, as in pollution, the individual faces institutions and practices that he cannot begin to influence or remedy. Indeed, not only is the consumer unable to correct evil practices or poor production methods but also he usually stands little chance of recovering his own losses from fraud or deception. The consumer is helpless when faced with distant corporate or government decisions, when confronted with restrictive laws and hostile courts, and when opposed by a battery of highly-paid lawyers.

For those who have explored this issue with concern for the consumer, it has become obvious that we must redress the balance between the hapless buyer and the indifferent business. If not, there will be no justice in the marketplace. Laws, trade customs, regulations, and institutions developed for our economy at the turn of the century by the Progressives are now hopelessly inadequate for the task of policing today's world of mass marketing and computerized industry. Nothing stands out as more eloquent testimony to the failure of outmoded attempts to aid the consumer than the Federal Trade Commission, a seemingly inert and lifeless bureaucracy long since exhausted of strength or initiative.

What we need is a redress in the imbalance of power between the buyer

* United States Senator from Maryland. Portions of this article have been previously published and appear here with permission. Tydings, *Fair Play for Consumers*, TRIAL, Feb., 1970, at 37.

and the seller. This can be done — and ought be done — beginning with two distinct yet complementary approaches. First, the consumer needs an advocate at the federal level. There is no one who exclusively represents the individual buyer in the councils of government or in the Byzantine maze of the federal bureaucracy. Only when there is someone whose responsibility is to fight, lobby, publicize, and sue for the consumer will our ossified institutions respond to the needs of the individual buyer. Second, the consumer must be given an adequate private remedy in court. No administrative agency can possibly guard the rights of millions of individual consumers or process the thousands of complaints that would be received each year. Each buyer is best protected by himself. Once he has a reasonable chance of recovering his damages, a court of law will be the most direct, efficient, and certain mode of redressing wrongs in the marketplace.

Both of these approaches are required for the consumer — a remedy in court for individual wrongs and an advocate at the highest levels of government to influence national policy. I introduced legislation last session that would serve the consumer in these ways. On April 25, 1969, I introduced the consumer class action bill (S. 1980)¹ and on May 1, 1969, I introduced the Consumer Affairs Act of 1969 (S. 2045)² providing for an Office of Consumer Affairs in the Executive Office of the President. Other senators have introduced bills in these areas, some similar and others quite different.

The executive has also drafted legislation on these two specific subjects. On December 3, the Administration submitted S. 3201, providing for consumer class actions; and on December 12, the Administration introduced S. 3240, its bill creating an Office of Consumer Affairs.⁴ As a strong proponent of consumer legislation, I welcomed this commitment by the Administration, for the Administration has repeatedly said that it means to act vigorously and effectively to protect the consumer. But if one looks beyond the rhetoric of the President's spokesmen and examines the proposed legislation in detail, it can be judged only as a dismal failure. In the words of Bess Myerson Grant, the head of the New York City Consumer Affairs Division: "The administration's so-called class action bill is like balloon bread. Substantial at first glance but sort [*sic*] on weight."⁵ She went on to say that it is in essence "a fraud" and that it is

not the product of the President's valiant special assistant for consumer affairs, Mrs. Virginia Knauer.

The administration bill is the product of White House assistants — and by the look of the legislation they have drafted, these are assistants whose primary concern is . . . not the interests of the consumer.

The single most disingenuous provision in the administration bill is its prerequisite of a Justice Department or FTC action before a class suit

1 115 CONG. REC. S4119 (daily ed. April 25, 1969). *See id.* at S4163-64 (remarks of Senator Tydings).

2 115 CONG. REC. S4477 (daily ed. May 1, 1969). *See id.* at S4497-98 (remarks of Senator Tydings).

3 115 CONG. REC. S15441 (daily ed. Dec. 3, 1969). *See id.* at S15445-47 (remarks of Senator Magnuson).

4 115 CONG. REC. S16569 (daily ed. Dec. 12, 1969). *See id.* at S16557-60 (remarks of Senator Javits).

5 The Washington Post, Feb. 6, 1970, at B1, col. 7.

may be brought. What assurance would consumers have that these agencies would have sufficient funding or personnel to prosecute the many thousands of instances of systematic consumer abuse which occur every year?

The 11 categories of wrongs to which the administration bill is addressed boil down in reality to only two categories — misrepresentation and failure to return deposits for goods not delivered.⁶

She said that failure to make good on guarantees, "unconscionable contracts," such as those in which a buyer is promised a discount if he persuades another person to make a purchase, and installment sales were subjects that had been overlooked.

The Administration's legislative promise of grand schemes is betrayed in the reality of fine print. Its legislation is the product of the politics of public relations; it is not written by those who are serious about the continuing abuses in the marketplace. Indeed, if we compare the elaborate promises of this Administration against the delivered product — its legislation — it appears that the American public is the victim of a consumer fraud. The consumer was promised protection, and he has received from the Administration only artifice.

I do not make these charges lightly; I shall document them. In order to understand the grave deficiencies of the Administration proposals, it is essential to present some background and to discuss the bills in detail.

The presence of nominal consumer agencies in the government and the present legal structure do not provide the consumer with an individual, private remedy that is at all adequate. For most of Anglo-American legal history, the law has coldly insisted: "Caveat emptor — the buyer beware." This was all very well when one was selling a cow to his neighbor and the man had a chance to look the animal over, but in today's marketplace, with sophisticated Madison Avenue techniques, whatever justification there may have been for such an unyielding policy no longer exists. Its chief effect in today's complex market is to place an undue burden on the contractual party least able to bear it. Too often the modern consumer is unable to assess the technical qualities of the product he purchases, to resist sophisticated sales campaigns, or to comprehend the multitude of credit plans and financial "deals" that he may be offered. Every year billions of dollars are wasted by consumers through the purchase of misrepresented merchandise. Although the least educated and more impoverished segments of society suffer most, all levels of society are affected. Commissioner Mary Gardiner Jones of the Federal Trade Commission characterized the situation this way: "No matter how informed and sophisticated the consumer, deception will take its toll and the very morality of the community is at stake when there is no effective legal action to be taken against such dishonest merchants."⁷

Public awareness of the need for consumer protection programs has had some salutary effects but has not resulted in a significant reduction in the incidence of fraud. False advertisers, loan sharks, and others of their ilk are still making exorbitant profits at the expense of the unwary consumer.

Despite good intentions and the proliferation of consumer protection laws

⁶ *Id.*

⁷ W. MAGNUSON & J. CARPER, *THE DARK SIDE OF THE MARKETPLACE* 59 (1968).

and agencies, our society continues to require that "the buyer beware." The activities of the Federal Trade Commission indicate the weaknesses of the present "agency" approach to the prevention of consumer frauds. Indeed, even Commissioner Elman of the FTC recently charged that this agency is marked by "waste, inefficiency, and indifference to public interest."⁸

The lengthy career of the Holland Furnace Co. provides a classic example of the ineffectiveness of administrative agencies in providing consumer remedies. Complaints about high-pressure tactics were made against the company as long ago as the early 1930s.⁹ In December of 1936 the company agreed to a Federal Trade Commission consent order against certain misleading advertising claims.¹⁰ Although complaints against the company continued,¹¹ a second proceeding was not initiated by the Federal Trade Commission until 1954.¹² Four years later, a cease and desist order was issued prohibiting Holland "from engaging in a sales scheme . . . whereby its salesmen gain access to homes by misrepresenting themselves as official 'inspectors' and 'heating engineers' and thereafter dismantling furnaces on the pretext that this is necessary to determine the extent of necessary repairs."¹³

This occurred not in 1930 or 1940. This occurred in 1958. For seven years Holland Furnace Co. ignored the court decree enforcing the cease and desist order. Finally, in 1965, the company was heavily fined for contempt of court.¹⁴

Consumer fraud is too widespread to be effectively policed by any one agency. By their very nature consumer protection agencies must select for action only the most blatant forms of fraud and only those operating on a large enough scale to justify the expenditure of agency time. Delay is inherent in a bureaucracy, administrative budgets and personnel are limited, and in some cases the statutory structure of powers of an agency may inhibit its effectiveness. More often than not, consumer agencies lack effective sanctions to enforce their decrees.¹⁵

It is clear that present agency remedies might as well be nonexistent. Just as important, the Office of Consumer Affairs that I propose will not remedy the problem by itself. This office can affect policy, it can litigate major cases, and it can attack flagrant and widespread practices. But no agency or agencies in Washington will provide enough protection for the defrauded consumer. We must provide a legal remedy that the individual can use immediately and effectively. The injured party has the incentive to carry through; he is the best guardian of his own interest. We thus must use a traditional American tool: the private lawsuit.

Today, of course, a victimized consumer may initiate a private action for fraud or for rescission of a sales contract on the basis of misrepresentation. In

8 The Washington Post, Sept. 11, 1969, at A2, cols. 1-2.

9 48 CONSUMER BULL., April, 1965, at 25.

10 *In re Holland Furnace Co.*, 24 FTC 1413-14 (1936).

11 48 CONSUMER BULL., April, 1965, at 25-26.

12 *In re Holland Furnace Co.*, 55 FTC 55 (1958), *aff'd*, 295 F.2d 302 (7th Cir. 1961).

13 *Id.* at 91.

14 *In re Holland Furnace Co.*, 341 F.2d 548 (7th Cir.), *cert. denied*, 381 U.S. 924 (1965).

15 *But cf.* Dixon, *Federal-State Cooperation to Combat Unfair Trade Practices*, 39 ST. GOV'T 37 (1966); Mindell, *N.Y. Bureau of Consumer Frauds and Protection—A Review of Its Consumer Protection Activities*, 11 N.Y.L.F. 603 (1965); O'Connell, *Consumer Protection in the State of Washington*, 39 ST. GOV'T 37 (1966); Rice, *Remedies, Enforcement Procedures and the Duality of Consumer Transaction Problems*, 48 B.U.L. REV. 559 (1968).

most cases, however, this remedy is more theoretical than real. Lawsuits are costly. The financial loss to a single consumer is not usually large enough to make individual litigation practicable. His court costs and attorney's fees may far exceed the judgment he is likely to receive if he prevails in his suit.

But while administrative agencies may have limited effectiveness with individual cases, and while the cost of an individual suit may be prohibitive, many persons acting as a class could afford to enforce their individual rights.¹⁶ A consumer class action compensates for the inability of individual consumers to litigate small individual losses by enabling one or more representatives of a group of consumers with similar injuries to place the group injury in issue. The aggregate group claim is generally large enough to warrant the necessary expenses and, more significantly, to make it possible to obtain private counsel on reasonable terms.

In addition to being economically infeasible, individual suits, even if their success is assumed, are unlikely to prove an effective deterrent to the dishonest company. In fact, many irresponsible companies probably treat the loss of an occasional small judgment as an ordinary risk of the trade — a risk offset by high profits obtained through misrepresentation or other deceit.

The consumer class action, in contrast, has beneficial effects that extend beyond the recovery of individual damages for the injured consumers. The mere existence of an effective class action remedy will deter improper conduct. The potential defendant is forced to consider not only the possible direct economic loss from a class action, but also the potential visibility, publicity, public reaction, and resulting loss of good will.¹⁷ Although the dishonest merchant may be able to safely ignore the separate complaints of many individuals, he cannot afford to disregard the public criticism of many voices raised in unison.

Experience in progressive states where the courts are amenable to consumer class actions reveals the potential protection for consumer rights that this procedural device can provide. In a recent case from the Supreme Court of California, for example, a taxicab customer was permitted to maintain a class action on behalf of himself and others similarly situated to recover allegedly excessive fares charged by a Los Angeles taxicab company over a period of four years.¹⁸ The court ruled that the action could properly be brought as a class action since the complaint showed the existence of an ascertainable class as well as a defined community of interest in the questions of law and fact affecting the parties to be represented. Although the individual members of the class would have had claims that were relatively insignificant, the aggregate claim of over \$100,000 made litigation feasible. The court, recognizing this fact, stated:

[A]bsent a class suit, recovery by any of the individual taxicab users is unlikely. The complaint alleges that there is a relatively small loss to each individual class member. In such a case separate actions would be economically infeasible. Joinder of plaintiffs would be virtually impossible in this case. It is more likely that, absent a class suit, defendant will retain

16 See Dole, *Consumer Class Actions Under Recent Consumer Credit Legislation*, 44 N.Y.U.L. REV. 80 (1969); Staars, *The Consumer Class Action*, 49 B.U.L. REV. 211 (1969).

17 See *Dolgow v. Anderson*, 43 F.R.D. 472, 485-88 (E.D.N.Y. 1968); Dole, *Consumer Class Actions Under the Uniform Deceptive Trade Practices Act*, 1968 DUKE L.J. 1101, 1103.

18 *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

the benefits from its alleged wrongs. A procedure that would permit the allegedly injured parties to recover the amount of their overpayments is to be preferred over the foregoing alternative.¹⁹ (Footnotes omitted.)

As the California Supreme Court has recognized, class actions are among the most potent of the weapons in the consumer's arsenal. But the class action procedure in many states is outmoded and archaic. While all states provide some form of class action, the manner in which the procedure is usually defined and limited often makes it unavailable in the typical consumer fraud situation. The New York cases, for example, require a unity of interest among the members of a class that approximates the test for compulsory joinder of parties.²⁰ New York also requires that class members desire identical remedies.²¹

Moreover, as a result of the recent Supreme Court decision in *Snyder v. Harris*,²² the federal courts appear to be even less hospitable to consumer class actions than state courts. Prior to *Snyder* the provisions of rule 23 of the Federal Rules of Civil Procedure appeared to establish a procedural basis for the maintenance of consumer class actions in those cases where a basis for federal jurisdiction existed.²³ But in that decision the Supreme Court ruled that separate and distinct claims cannot be aggregated to meet the required \$10,000 jurisdictional amount. This ruling in effect makes the rule 23 action, the most modern class action procedure in the United States, unavailable to the defrauded consumer who has a claim of less than \$10,000, even if he can satisfy the necessary diversity or federal question requirement for jurisdiction. The case thus effectively precludes recourse to the federal courts in consumer class actions.

It was because of this legal situation and the obvious need for vigorous action in the consumer field that I introduced S. 1980 last spring. Congressman Bob Eckhardt, with whom I have worked closely, introduced a companion bill in the House.^{23a} S. 1980 would provide for consumer class actions in federal court where state or federal consumer protection laws have been violated. The bill was designed to reverse the effects of *Snyder* and, in addition, to broaden the basis for federal jurisdiction over consumer fraud. By doing so, it would make available the liberal machinery of federal rule 23 for classes of persons bilked in situations involving deception, fraud, or other illegal overreaching.

In July, the Senate Subcommittee on Improvements in Judicial Machinery, of which I am chairman, held hearings to consider the merits of S. 1980. Testimony was heard from, among others, Ralph Nader; Virginia Knauer, Special Assistant to the President for Consumer Affairs; and Bess Myerson Grant,

19 *Id.* at —, 433 P.2d at 746, 63 Cal. Rptr. at 738; *accord*, *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 563 (2d Cir. 1968).

20 *E.g.*, *Society Million Athena, Inc. v. National Bank*, 281 N.Y. 282, 22 N.E.2d 374 (1939); *Brenner v. Title Guar. & Trust Co.*, 276 N.Y. 230, 11 N.E.2d 890 (1937).

21 *E.g.*, *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 204 N.E.2d 627, 256 N.Y.S.2d 584 (1965). Prior to 1966, the Federal Rules of Civil Procedure required that a common remedy be sought by all members of a class. Fed. R. Civ. P. 23(a)(3), 308 U.S. 689 (1938). This is no longer required in the federal system. Fed. R. Civ. P. 23(a).

22 394 U.S. 332 (1969).

23 *See* Donelan, *Prerequisites to a Class Action Under New Rule 23*, 10 B.C. IND. & COM. L. REV. 527 (1969); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 375-400 (1967).

23a H.R. 11656, 91st Cong., 1st Sess. (1969).

Commissioner of the Department of Consumer Affairs for the City of New York — all of whom supported the concept of increased consumer access to the class action procedure in the federal courts.

In her testimony, Mrs. Knauer presented a somewhat different approach than S. 1980, suggesting legislation to permit consumer class action suits for the broad range of practices condemned as "unfair or deceptive" under the Federal Trade Commission Act. After close study of Mrs. Knauer's proposal, I concluded that it complemented the provisions of S. 1980. On October 29, therefore, I introduced S. 3092²⁴ combining Mrs. Knauer's proposal with my own. Congressman Eckhardt introduced similar legislation in the House.^{24a}

Basically, S. 3092 confers upon federal courts (without regard to amount or citizenship) jurisdiction to hear class suits based on acts in fraud of consumers. An "act in fraud of consumers" is defined as including two distinct things: (1) "an unfair or deceptive act or practice which is unlawful within the meaning of section 5(a)(1) of the Federal Trade Commission Act," or (2) "an act that gives rise to a civil action by a consumer or consumers under State, statutory or decisional law for the benefit of consumers."²⁵

The federal court would apply state law in the consumer class action cases exactly as state law is applied in a diversity of citizenship case.²⁶ Thus, the court in any suit would be dealing with a definite body of law in a manner in which it is accustomed to deal with that law. Moreover, use of existing bodies of state law and of Federal Trade Commission rulings prevents the coverage of the bill from being "vague."

Perhaps the most significant provision of S. 3092 is section 4(d), which governs the award of attorney's fees. If an action has been successful, the attorney will receive an award of a reasonable fee, based on the value of his services to the class.²⁷ I have become increasingly convinced that the private bar is the untapped reservoir of consumer power. S. 3092 is designed to insure the ready availability of competent, well-compensated counsel. By doing so, it guarantees a major increase in legal muscle for the consumer. Significantly, that muscle will be in the form of private legal actions, the traditional method of effectively redressing grievances in this country.

By using traditional institutions and proven procedures we can attack this problem of consumer fraud directly. We do not need elaborate new schemes; we do not need massive governmental intervention; we need not regulate the free market. All that is required is that we open the courts to this long-neglected area.

Unfortunately, various pressures have induced the Administration to retreat from the strong proposal originally advocated by Mrs. Knauer. The bill that the President finally sent to Congress offered a sorry substitute for the meaningful consumer protection that the American people had a right to expect.

Under the President's proposal a consumer cannot file a suit no matter

24 115 CONG. REC. S13426 (daily ed. Oct. 29, 1969).

24a H.R. 14595, 91st Cong., 1st Sess. (1969).

25 S. 3092, 91st Cong., 1st Sess. § 4(a)(2) (1969).

26 *Id.* § 4(c).

27 *Id.* § 4(d).

how outrageous the fraud may be. Under the Administration proposal, the private remedy that is supposed to give every consumer the chance to have his day in court is tied to governmental bureaucracy. Before the consumer can file a suit, the Attorney General must have initiated and won a suit on behalf of the government or the FTC must have filed a final cease and desist order.²⁸ Thus individual suits must depend upon the promptness and concern of the Justice Department or FTC bureaucracy — both of which are far from being consumer agencies. Under the Nixon bill, a consumer's right to his day in court is more restricted than that of a treble damage plaintiff in an antitrust action. Must we repeat the failures of the dormant FTC? What is the point of giving the buyer an effective private action if it is made to depend upon bureaucratic approval?

Just as disastrous for the consumer, both governmental and private suits would be limited to a narrow series of defined forms of fraud — forms that unscrupulous merchants can change as rapidly as legislation can be enacted. Under this severe limitation, the consumer will have fewer remedies than he would in state courts. Why grant the consumer the advantage of the federal procedure and then deny him the power of state substantive law? With these two crippling limitations the consumer will be little better off than he is today.

As noted earlier, no purely administrative change will solve the consumer's problems; primary reliance must rest upon private initiative in the courts. But a pure consumer agency, representing the consumer alone, can have profound impact upon key government decisions, agency rulings, and court actions. At present, no one represents the consumer in Washington; and even the class action proposal will not remedy this particular lack of representation. We need an Office of Consumer Affairs.

I am quite flattered that the Administration bill creating an Office of Consumer Affairs (S. 3240) so closely follows my own bill (S. 2045) in so many respects. I regret, however, that in several crucial areas the Administration proposal differs from mine; these differences add up, in my opinion, to a virtual emasculation of authority of the Office of Consumer Affairs and make this reorganization more cosmetic than real.

In delegating functions to the Office of Consumer Affairs, the two bills are very similar. Both measures provide for an office (1) to coordinate federal action and programs affecting consumers; (2) to disseminate consumer information; (3) to initiate and coordinate consumer research; (4) to aid efforts at consumer education; (5) to assist state and local consumer efforts; (6) to investigate and report on consumer affairs; and (7) to be the consumer "advocate" within the federal government.²⁹ Where the bills differ is in the powers granted to the Office of Consumer Affairs.

In the area of consumer complaints, for example, my bill provides for a consumer office that can investigate and then act.³⁰ Under the Administration

28 S. 3201, 91st Cong., 1st Sess. § 204 (1969).

29 Compare S. 2045, 91st Cong., 1st Sess. § 3 (1969) with S. 3240, 91st Cong., 1st Sess. § 103 (1969).

30 S. 2045, 91st Cong., 1st Sess. § 4 (1969).

plan, however, the office can do neither; it merely is a passive transmission belt for consumer complaints to the appropriate agencies.³¹

Under section 3(b)(2) of my bill, the Consumer Office will establish consumer centers across the country to bring the federal consumer advocate within reach of the consumer himself. The Administration makes no such proposal.

In section 5(b) of my bill there is a specific provision that, upon a complaint, the Office of Consumer Affairs "shall take whatever action may be appropriate to resolve the complaint . . . including, but not limited to, referral to an appropriate . . . agency."³² In the Administration bill, all that the office is permitted to do is "transmit" the complaint to the appropriate agency. Washington already has enough people whose sole function is to refer unsolved problems to other people. The entire point of an Office of Consumer Affairs is to create an organization outside the existing bureaucracies to provide action for the consumer; we must provide a federal advocate and representative for the consumer who will face the bureaucracy. I cannot understand how an organization that merely ferries consumer complaints to existing departments and agencies will change the present situation at all.

Further, the full power of investigation is granted to the Consumer Office under my bill so that a complete inquiry can be made following any complaint;³³ this power is obviously necessary if any successful solution is to be provided by the office for valid complaints. More important, the function of consumer advocate requires the powers of investigation to discover whether individual complaints reflect widespread practices that must be corrected.

Under my proposal, the Office of Consumer Affairs is granted a full battery of discovery or investigative powers to be used for all purposes. Section 5(d) utilizes the subpoena power for documents and witnesses, deposition authority, and the contempt of court provisions of section 9 of the Federal Trade Commission Act. In order to add punch to the eyes and ears of the consumer advocate, I have added the penalty provisions of section 10 of the same Federal Trade Commission Act, which contains stiff fines and jail sentences for willful refusal or false statements.

In stark contrast to these broad powers of investigation, the Administration's plan has discovery provisions that are drafted to practically blindfold the consumer advocate. There are no investigatory powers that can be used for complaints.

Indeed, the President's Office of Consumer Affairs itself has no investigatory powers; rather these are vested in the Consumer Protection Division of the Justice Department.³⁴ Even the division's investigatory powers are limited to general investigation. Thus under the Administration's bill there is the anomaly of having the policy investigation power given to the prosecutors; the policy body, the Office of Consumer Affairs, must proceed blindly. To compound this ridiculous situation further, the power of investigation relating to actual court cases or regulatory proceedings, that is, the prosecutor's investigatory power, is

31 S. 3240, 91st Cong., 1st Sess. § 104 (1969).

32 S. 2045, 91st Cong., 1st Sess. § 5(b) (1969).

33 *Id.* §§ 5(c)-(d).

34 S. 3240, 91st Cong., 1st Sess. § 204 (1969).

given to the federal agency involved in the proceedings and not to the consumer prosecutor.³⁵ Thus, the Division of Consumer Protection under section 203 can intervene to present the consumer's case in court or before an agency — presumably to present the consumer point of view — but under section 204(a)(3) the consumer lawyer has to rely on that very agency for discovery powers.

If the agency does not want to do anything, nothing happens. Two or three secretaries could be set up right now in the White House to pass on complaints to the agencies. Basically, that is what has been happening for the last twenty or thirty years.

The authority for intervention on behalf of the consumer in regulatory proceedings and appeals of those proceedings or in district courts and courts of appeals is similar in both my bill and the Administration proposal — the difference in approach lies with the people given this authority. In S. 2045, this power is given to the consumer advocate, the Office of Consumer Affairs.³⁶ Thus an independent body whose only task is to represent the consumer is given the power to do precisely that — represent the consumer. This guarantees that a new point of view is injected into agency and court proceedings. At last someone will speak for all the unrepresented consumers across the land.

The Administration divorces the power to intervene from the Office of Consumer Affairs and puts it back into an ongoing bureaucracy — the Justice Department. Those who are the policymakers cannot be the advocates. The Justice Department advocates are, as I pointed out above, dependent upon the agencies involved for any information gathering powers, so they have no independent source of information. Most distressing, the Justice Department also may have the responsibility to defend the agency itself if it is in court.

Thus the very same department — albeit with different divisions — which has the responsibility of bringing in the consumer perspective also has the responsibility of presenting the agency perspective. I cannot imagine a greater conflict of responsibilities in one department. It simply does not make sense to create a new structure — the Office of Consumer Affairs — because an independent view, a new perspective, must be created at the federal level and then not permit that new structure to present its case. What is the point of a consumer advocate if it cannot advocate?

At the federal level, many of the decisions that affect the consumer most directly are not made in adversary proceedings before courts or agencies. Rather they are made in the policy decisions of the departments, agencies, or high-level committees. The need for the consumer advocate, a separate, new voice in the higher councils of government, is the very reason for creating the Office of Consumer Affairs and placing it in the President's executive office. We must create a high-level, policy advocate for the consumer.

For this reason, my bill specifically provides for the intervention of the Consumer Office as a matter of right when "any matter" is pending before an agency or department that "may affect substantially the interests of consumers."³⁷

³⁵ *Id.* at 204(a)(3).

³⁶ S. 2045, 91st Cong., 1st Sess. § 4 (1969).

³⁷ *Id.* § 4(d).

Contrast this clear mandate for the Consumer Office to plead the case of the consumer to the Administration's analogous provision, section 301.³⁸

For instance, in the matter of import quotas of oil, a matter handled by the Secretary of the Interior, we have a decision which, when the amount of oil coming into this country is restricted, can raise the cost of living for the average consumer by many dollars every year. Here is where the consumer ought to be represented. Here is where a people's counsel, here is where a public defender, here is where a consumer advocate ought to be in there fighting for the consumer. There is no one in there now.

Under the President's proposal, the Office of Consumer Affairs is given no authority to speak or intervene in any matter, through any bureaucratic maze, to represent the consumer. The Division of Consumer Affairs in the Department of Justice is given no authority to speak or intervene. There is no institutional change. Departments and agencies are merely directed to "give due consideration to the valid interests of consumers."³⁹

Well, they are supposed to do that now, yet we know it is not happening. To me, this directive is cruel deception. It is next to meaningless. Nothing can be more inadequate for the consumer. It is a clear decision to do nothing at all.

I hope I have brought to light some of the grave inadequacies of the Administration's proposals; no help to the complaining consumer; no independent investigatory powers for the policymakers or advocates; no separate institution for consumer advocacy; and no representation in policymaking decisions. It can only be concluded that the Administration's program is totally inadequate. It is a promise without the possibility of fulfillment. It is the consumer advocate blindfolded and tongue-tied.

Hard choices must be made about these measures, but the choices are clear-cut. Either we have the appearance of relief for consumers and the illusion of redress of fraud and deception or we have major substantive changes in the law. We can pretend we are helping the consumer by offering him an Office for Consumers with no real powers and a cause of action strangled with crippling devices or we can create meaningful solutions to long-standing problems. We confront a question of purpose. Are we interested in short-term, political gain built upon elaborate but empty proposals? Or are we interested in granting the hard-pressed consumer his day in court and his voice in the decision-making process? There are only two types of proposals now pending in the Senate — those that will be effective and those that are drafted to be ineffective.

If the Senate will not do something for the consumer, I hope the consumer will elect those who will.

38 S. 3240, 91st Cong., 1st Sess. § 301 (1969).

39 *Id.*